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IN THE

Supreme Court of the United States

October Term, 1957

No. 1017

DE BOYES, INC., ARKE, INC., CAPRI JEWELRY, INC., JULES STEINBERG, MORRIS KIMMELMAN, HYMAN SLOVITT, ABRAHAM J. SLOVITT and SAMUEL FRIEDMAN d/b/a I. STEINBERG-KASLO COMPANY (sued as JULES STEINBERG and I. SLOVITT d/b/a B. STEINBERG KASLO COMPANY), VOLUPTE, INC., and WALTER HEIMLER, INC.,

Petitioners,

—v.—

MARCEL BOUCHER d/b/a BOUCHER, and MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENTS

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Respondents.

BRIEF IN OPPOSITION FOR THE RESPONDENTS

Opinions Below

The findings of fact and conclusions of law and interlocutory and final judgments of the District Court (D. 152a-171a)[1] are not officially reported. The opinion of the United States Court of Appeals for the Second Circuit is reported at 253 F. 2d 948.

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[1] References in this form are to the printed appendices in the Court of Appeals: petitioners' appendix is indicated by D and respondents' appendix is indicated by P.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit which the petition seeks to have reviewed, was dated and entered April 7, 1958. The jurisdiction of this Court is invoked by petitioners under 28 U. S. C. Section 1254(1).

The Questions Presented

After three years of litigation petitioners belatedly seek to formulate for review a question as to whether artistic jewelry is "writings" within the purview of Art. 1, Sec. 8, Cl. 8 of the Constitution of the United States.

The record discloses that this question was not raised by petitioners either in their pleadings, or in the trial before the District Court. It was not raised in the briefs or arguments before the Court of Appeals. Neither of the decisions below, on their face or implicitly, gives the slightest indication that the respective Courts deemed themselves to be considering or deciding a constitutional question. Even now, the few vague and conclusory references in the petition do not seriously present a constitutional question.

The petition on its face discloses that petitioners are attempting at this juncture to repeat and re-argue in this Court, under the guise of a constitutional question, other contentions which have been expressly rejected by two Courts below, and which have been characterized appropriately by the Court of Appeals as "lacking substance." Respondents submit that the record presents only these narrow questions:

1. Whether it appears on the record before this Court that a constitutional question constituting an appropriate ground for review was presented in and expressly or necessarily decided by the Court of Appeals?

2. Whether the term "works of art" in Section 5 of the Copyright Act (Title 17 U. S. C. §5) includes the authority to copyright the jewelry designed and manufactured by respondents?

3. Whether one copyright notice on respondents' pair of earrings constitutes sufficient notice of copyright where such earrings were invariably designed, manufactured and sold and purchased as a unit?

Statement

Respondent, Marcel Boucher, the owner of the copyrights in suit, has been a designer of jewelry for 45 years (P. 2a). After studying applied design, modelling and sculpture in France, he served as an apprentice to some of the leading jewelers in Paris, and subsequently executed assignments of importance, including the design of jewelry for European royalty (P. 2a). Respondent, Marcel Boucher et Cie., is the licensee of the Boucher works, and numbers among its customers the leading retail stores in the country.

The pieces in suit were personally conceived by respondent, Boucher. Typically, he would commence his artistic conception by making a series of rough pencil sketches, and finally full color sketches until the desired artistic effect was obtained. The resulting designs were then laboriously worked and reworked in the form of handmade metal models until the pieces captured the artistic effect originally sought in the drawings (P. 3a-4a). From the

handmade models, rubber molds for casting production copies were made.

A number of original pins, necklaces and pairs of earrings created by this art technique were introduced to the public by respondents in 1954 and 1955. Petitioner, B. Steinberg-Kaslo Company, is a manufacturer, and the five corporate petitioners are jobbers, of costume jewelry. After gauging the wide public acceptance of the original Boucher works, B. Steinberg-Kaslo purchased the 25 most popular Boucher works in retail stores, put them in rubber molds to make copies, and sold the copies to the corporate defendants and to other jobbers throughout the country (P. 11a-15a). In 1955 over 300,000 "carbon copies" of the 25 original Boucher works were placed on the market by petitioners (P. 29a). This action was instituted by respondents on July 7, 1955.

Petitioners have never seriously denied their acts of deliberate piracy, or the fact that the Boucher pieces in suit were both original and artistic (D. 159a). In an attempt to avoid the consequences of their infringement, petitioners interposed no less than 14 affirmative defenses (D. 83a-150a) raising almost every conceivable question in respect of respondents' compliance with the technical requirements of copyright. The District Court rejected these defenses, and in its interlocutory judgment, dated January 7, 1957, granted a permanent injunction and directed an accounting with respect to damages and profits. After protracted hearings before the special master, the District Court confirmed the report of the special master and on October 1, 1957, awarded final judgment to respondents in the sum of $32,757.22, including an attorney's fee of $10,000 (D. 168a).

In its *per curiam* opinion, dated April 7, 1958, the Court of Appeals affirmed in all respects the judgment of the District Court, stating in part:

> "It is not seriously disputed but that defendants manufactured and sold carbon copies of certain items of costume jewelry which had been registered in accordance with the Copyright Act as works of art.
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> * * * * *
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> "The trial court found that defendants deliberately copied plaintiffs' copyrighted articles of costume jewelry; that said items were artistic in nature and were marked in compliance with the statute. The evidence adequately supports the findings * * *.
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> "Plaintiffs request an allowance of additional attorneys' fees for this appeal. In view of the deliberate nature of the infringement and the lack of substance to the defendants' contention on this appeal, the request has received consideration. * * * "

Reasons for Denying Certiorari

(1) Petitioners' failure to present a constitutional question which was expressly or necessarily decided by the Court of Appeals precludes the presentation of such question for review by this Court.

Even now, petitioners furnish no reasons and cite no decisions of this or any other Court expressly or impliedly disputing the authority of Congress to include artistic jewelry as copyrightable subject matter within the meaning of Art. I, Sec. 8, Cl. 8 of the Constitution. Certiorari should not be granted at the instance of parties who do not, or

cannot, furnish authority to substantiate their naked formulation of questions.[1]

(2) Petitioners concede that there is no conflict between the Circuits on the same matter. Petitioners venture to assert, however, that conflict is "not likely" to arise outside the Second Circuit, because "substantially all of the costume jewelry sales are centered in New York City." (Pet. p. 13.) There is no authority in the record or otherwise to support petitioners' *a priori* suggestion that piracy of artistic jewelry designs is endemic to only one judicial circuit. Be that as it may, the possibility of a conflict in future artistic jewelry cases is remote, not for the reason assigned by petitioners, but rather because of the binding precedent established by this Court squarely sustaining the regulation of the Copyright Office covering artistic jewelry,[2] as well as the unfettered sweep of the decisions of the lower courts to date sustaining copyrights on artistic jewelry. In the light of the unqualified judicial approval of artistic jewelry copyrights, petitioners' advocacy of a return to free-booting in this field would have confusing and disastrous consequences.

(3) Equally untenable as a reason for granting certiorari is the alleged error of the Court of Appeals in upholding the validity of a copyright notice on one of a pair of

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[1] Respondents submit that the Boucher jewelry in suit comes squarely within the meaning and intendment of Art. 1, Sec. 8, Cl. 8, and that if that question had been raised below, the authorities would have compelled such conclusion by the Court of Appeals. Although neither the petition nor the record calls for any discussion of the alleged constitutional question on the part of the respondents, in the interests of completeness respondents have collected the pertinent authorities at pages 12 to 20 herein.

[2] *Mazer* v. *Stein*, 347 U. S. 201, at 214.

earrings. Once more, petitioners fail to cite any authority claimed to be in conflict with the decisions cited in the opinion below. There is no need to belabor petitioners' suggestion that beneath the anatomical fact that women possess two ears lurks an important question of federal law. Rather than being a question of public importance, just like petitioners' other hypertechnical questions which have been held below to "lack substance," the question of notice on pairs of earrings merely involves the private interests of a handful of design pirates seeking to find refuge in every conceivable argument which will permit them to capitalize on the artistic labors of others.[1]

(4) Petitioners do not contend that the decision below sustaining the copyrights in suit was "in conflict" with the recent decision of this Court in *Mazer* v. *Stein*, 347 U. S. 201. Without citing any other decision of this Court which they deem to be "applicable," petitioners argue with complete insouciance that the Court of Appeals erred "in applying *Mazer* v. *Stein*, 347 U. S. 201, to the case at

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[1] All of the decisions involving physically separate but interdependent articles hold that a copyright notice on one is sufficient. In *Patterson* v. *Century Products*, 2 Cir. 1937, 93 F. 2d 489, cert. den. 303 U. S. 655, relied upon by the Court of Appeals below, the Court sustained a copyright on a jungle film divided into reels, where the copyright notice was on only the first reel, and each reel showed the interdependence of all. *Lydiard-Peterson Co.* v. *Woodman*, 8 Cir. 1913, 204 Fed. 921, also cited by the Court below, involved a copyright on a directory with a separate map contained in a pocket of the book. The copyright notice was only on the book. The infringer copied only the map, and it was held that notice on the book was sufficient to protect the map. See also *Hoague-Sprague Corporation* v. *Frank C. Meyer Co.*, E. D. N. Y. 1929, 31 F. 2d 583; *Fielding* v. *Hawley* (1883), 48 L. T. 639, 47 J. P. 582. The findings below show that each pair of plaintiffs' earrings was designed, manufactured, sold and copyrighted as a unit (D. 10a, 13a). When petitioners purchased the Boucher works in retail stores, they recognized, copied and sold them to the public for what they were—pairs of earrings (D. 15a).

bar" (Pet. p. 12). In view of the decision in *Mazer* v. *Stein* upholding the validity of the very regulation involved herein, and in the absence of any demonstrated conflict with any other decision of this Court, the petition is frivolous insofar as it seeks certiorari on the ground that the Court of Appeals misconstrued "the decisions of this Court with respect to copyrights" (Pet. p. 12).[1]

ARGUMENT

I.

Petitioner did not present a constitutional question below.

The question which petitioners now seek to formulate as to whether artistic jewelry is "writings" under the Constitution, has never been and is not now seriously tendered in this case. No amount of semantic legerdemain on the part of petitioners can transform the record now before this Court into something different from the record on which the case was tried, appealed, briefed, and argued below.

The only contention pressed with solemnity by petitioners in the Court below related to the alleged invalidity of the Boucher copyrights on three pairs of earrings with the statutory copyright notice affixed to one of each pair of earrings, which were designed, manufactured, sold, reg-

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[1] The 1957 Regulations of the Copyright Office (37 C. F. R. 1957 §202.10), which conform squarely with the criteria of copyrightability established in the *Mazer* case, also enumerate "artistic jewelry" as the first example of works of art eligible for registration.

istered *and copied* as pairs.[1] Other than this alleged question of notice (which even petitioners do not seriously urge warrants review by this Court on certiorari), petitioners raised below only one other question which they now seek to have reviewed.

That question (set forth as Question 2 in the petition) concerned the authority of the Register of Copyrights to promulgate the Regulation (37 C. F. R. 1949, §202.8; Pet. p. 8) which includes "artistic jewelry" as one of the "works of art" eligible for copyright under Section 5 of the Copyright Act (Title 17 U. S. C. §5). The Court of Appeals made short shrift of petitioners' attempt to ignore the applicable principles established by this Court, and stated (Pet. App. 2a):

> "The decision in *Mazer* v. *Stein*, 347 U. S. 201, in which the regulation, authorizing the registration of items of artistic jewelry, is cited, is a complete answer to such contention."

Not once in their pleadings, briefs, arguments, or otherwise, in the Courts below did petitioners even hint at a constitutional limitation on the authority of Congress to include artistic jewelry as copyrightable subject matter. Petitioners' entire argument below was confined solely to the authority of the Register of Copyrights to include artistic jewelry as copyrightable subject matter without specific authority from Congress. On the very eve of trial,

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[1] Petitioners' concentration in the lower courts on the question of the sufficiency of notice on the Boucher earrings was prompted by the fact that defendants' infringing earrings accounted for approximately 50% of their profits on all of the infringements. A holding of invalidity on the copyrights protecting the pairs of earrings would have reduced respondents' recovery of damages and profits proportionately.

on October 16, 1956, petitioners amended their answer to the complaint by interposing a twelfth, thirteenth and fourteenth defense, and still did not raise a constitutional question (D. 148a-150a).

Oddly enough, in their one fleeting reference to the Constitution in the proceedings below, petitioners actually conceded the power of Congress to include artistic jewelry as copyrightable subject matter, where they stated (at pages 20-22), after quoting the copyright clause:

> "It is not contended that the copyright clause of the Constitution was intended to protect only literal 'writings' * * * but it is contended that from the first enactment in 1790 to the most recent codification in 1947, *it was the Congress which determined the scope of copyright. What has been construed as copyright within the definition of 'writings' was decided by Congress* and not by any arbitrary rule or regulation of the Copyright Office. * * * The elimination of the word 'fine' from the 1909 and 1947 Acts does not authorize the Copyright Office to include therein articles of costume jewelry, which comes within the province of design patents. *Such inclusion in the copyright law should be only by Act of the Congress in accordance with its past performances* * * *. (Emphasis supplied.)

As indicated by the foregoing, the inquiry addressed by petitioners to the Court below was not whether the Boucher works were "writings," but, rather, whether they were "works of art." Granting, as petitioners did, the power of Congress to extend copyright protection to "works of art," the only conceivable question tendered to the Courts below was whether Section 202.8 of the then regulations of the Copyright Office properly limned the statutory

phrase, "works of art." The Court of Appeals held that *Mazer* v. *Stein* was "a complete answer to such contention."

This Court long ago stated, and has restated time and time again, its most fundamental rule of procedure that the Court will not decide constitutional questions if they are not raised in the Court below, or if raised below, not presented in the "clean cut," "concrete" and "unclouded" form demanded for the decision of constitutional issues. *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U. S. 549, 584.

See also:

Keokuk and Hamilton Bridge Co. v. *Illinois*, 175 U. S. 626, 633;

Chicago & G. T. R. Co. v. *Wellman*, 143 U. S. 339, 345;

Aircraft & Diesel Equipment Corp. v. *Hirsch*, 331 U. S. 752.

Even in criminal cases, where vital questions of constitutional rights often come into play for the first time at high appellate levels, this Court has adhered to the rule that constitutional questions not raised in the record below will not be considered. *Yakus* v. *U. S.*, 321 U. S. 414, 444. Certainly, departure from this fundamental, traditional rule should not be undertaken in a purely private controversy, and at the instance of deliberate design pirates seeking to delay the day of judgment by last-minute constitutional "afterthoughts."

The instant petition is barren of any reasons for justifying departure from the salutary and long-standing procedure of this Court.

Petitioners assert in a most generalized and vague manner at page 10 of the petition: "There is no authority under the constitution or by act of Congress to include costume jewelry as copyrightable subject matter."

Petitioners do not even make a token effort to support their newly discovered constitutional question by argument or by citation of authority. One searches the petition in vain for even skeletal development of the suggestion that the Boucher jewelry in suit is not "writings" in the constitutional sense. Manifestly, the puzzling "see-where-this-may lead-us" argument devised by petitioners in dragging in the Universal Copyright Convention for the first time, hardly advances the inquiry. Petitioners' resort to this device and their failure to furnish guidance to the Court on the question they profess to be worthy of review on certiorari, confirms their own misgivings as to the merits thereof.

II.

The jewelry in suit is a proper subject of copyright within the meaning of Article I, Section 8, Clause 8 of the Constitution.

Reaching for a *tabula in naufragio*, petitioners ignore the findings of fact below and have grasped at the separate opinion of Mr. Justice Douglas (in which Mr. Justice Black concurred) in *Mazer* v. *Stein, supra.*[1] In his sepa-

[1] In his opinion Mr. Justice Douglas stated that much research was needed on the question he raised. Thereafter, at the suggestion of the Copyright Office, Professor Walter Derenberg and seven associates at the New York University School of Law prepared an extensive study on the subject, presented in "The Meaning of 'Writings' in the Copyright Clause of the Constitution," 31 N. Y. U. L. R., pp. 1263-1312 (Nov. 1956).

rate opinion, Mr. Justice Douglas lists miscellaneous examples of copyrighted articles—from "statuettes, bookends, clocks" to "salt and pepper shakers, fish bowls, casseroles, and ash trays." Yet, it is respectfully submitted, the question of artistic claim to copyright cannot be determined in the abstract, but only in relation to a specific work. The salt shaker on the restaurant table may be a mere piece of tableware, yet no one would deny Cellini's saltcellar as a great work of art.

It is to be remembered that the basic purpose of the constitutional provision as well as the expressed power itself is "To promote the Progress of Science and useful Arts." If the term "writings", which follows this broad grant of power in Clause 8, is to be interpreted as confining the rights to literary authors, then both the purpose and the power itself will be defeated.

The pieces in suit were created by an internationally known designer of artistic jewelry, who designs both costume jewelry and precious jewelry, the only difference between the two being that costume jewelry uses base metals and artificial stones.

The District Court's decision was based on findings of fact supported by substantial evidence that the jewelry pieces were artistic productions and works of artistic craftsmanship conceived as original with Marcel Boucher, and properly entitled to the protection of the Copyright Act (D. 155a). The Court of Appeals specifically confirmed findings of fact that the Boucher works were 'artistic in nature." It is submitted that even if the standards of works of the "fine arts"—as distinguished from the broader category "works of art" in the present statute—

were applied to the pieces in suit, they would qualify as such by reason of Marcel Boucher's originality, the art techniques used, and the uncontroverted expert testimony.

It is respectfully submitted that if this Court denies the constitutional basis of protection for works of art such as the jewelry pieces in suit, because of a restrictive condition of literal "writings," then there can be no justification for the extension of copyright over the past one hundred and fifty years to prints, maps, paintings, sculptures, music, photographs, motion pictures, or any visible expressions of the intellect other than the limited category of books, pamphlets and manuscripts. Such an interpretation of Art. I, Sec. 8, Cl. 8 would come dangerously close to stultifying the artistic and cultural advances in this country which Congress has sought to encourage in its exercise of the power. There is no public policy or social interest to be served by circumscribing the rights of the artist to be protected against plain and deliberate piracy.[1]

Neither the language of Art. I, Sec. 8, Cl. 8, nor the contemporary sources, nor the historical interpretation in Congress and in the courts, affords a sound basis for denying copyright to jewelry, one of mankind's great traditional arts.

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[1] Speaking for this Court in *Mazer* v. *Stein, supra,* Mr. Justice Reed concluded his opinion by stating:

> "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."

(A) The Constitutional Basis

The language of Art. I, Sec. 8, Cl. 8 shows no intention by the framers of the Constitution to limit copyright to "writings" in a restricted sense of that word. The context is a grant of power to promote the progress of "Science and useful Arts" to be exercised in favor of "Authors." Science in its contemporary meaning embraced all knowledge, the arts were at least as broad as science, and an author was the originator of things.[1]

In the development of the clause in the Constitutional Convention the choice of the term "author" appears to have had more significance than the word "writings".[2] The latter term was introduced into the final draft by the drafting committee and adopted without debate.[3] It is, moreover, significant that in the *Federalist*, where Madison felt it necessary to discuss in detail the constitutional limi-

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[1] For contemporary meanings in the ordinary sense, see Samuel Johnson, A Dictionary of the English Language (1775 ed.):

"Science" is given five meanings: 1. Knowledge. 2. Certainty grounded on demonstration. 3. Art attained by precepts, or built on principles. 4. Any art or species of knowledge. 5. One of the seven liberal arts, grammar, rhetoric, logic, arithmetic, music, geometry, astronomy.

"Art" is defined to mean: 1. The power of doing something not taught by nature and instinct. 2. A science. 3. A trade. 4. Artfulness; skill, dexterity. 5. Cunning. 6. Speculation.

"Author" has four meanings: 1. The first beginner or mover of any thing; he to whom anything owes its origin. 2. The efficient; he that effects or produces any thing. 3. The first writer of any thing; distinct from the translator or compiler. 4. A writer in general.

"Writing" is defined as: 1. A legal instrument; as, the writings of an estate. 2. A composure; a book. 3. A written paper of any kind.

[2] Madison submitted a clause for *literary* authors. Pinckney's version was for authors generally. Pinckney's designation was chosen. See Karl Fenning, "The Origin of the Patent and Copyright Clause of the Constitution", 17 Geo. L. J. 109 (1929).

[3] *Ibid*, pp. 113-114.

tations on other powers of Congress, he refrains from suggesting any limitations on the copyright power and grounds it on the accepted common law.[1]

The copyright clause and its background are consistent with a developing copyright law that continues to adapt itself to the needs of the country as they evolve. The whole history of the copyright power both in the Acts of Congress and in the decisions of the courts shows that to promote science and the arts, the clause is broad enough to protect all original creative works and that whenever new methods of reproduction make possible the pirating of another's artistic works, the Congress may legislate protection, as it has done.

From the first exercise of the constitutional power, the Act of 1790,[2] the protection has not been limited to literal "writings". That Act adopted by a Congress that included many of the members of the Constitutional Convention mentioned maps and charts before books. The Act of 1802.[3] covered designing, engraving, etching or working historical or other prints. These two statutes, adopted in the early period of the Constitution and with the background of contemporary thinking on the constitutional authority, demonstrate forcibly that Art. I, Sec. 8, Cl. 8 was not intended to limit the scope of the copyright power and to single out "authors" of literary productions and deny protection to "authors" of the other creative arts. The

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[1] The Federalist, No. XLIII, Jan. 25, 1788 (Lippincott & Co., 1864 ed.), page 338.

[2] Act of May 31, 1790, c. 15, 1 Stat. 124.

[3] Act of April 29, 1802, c. 36, 2 Stat. 171. This Act was also adopted by a Congress that included members of the Constitutional Convention.

enumeration of maps, charts, historical and other prints cannot be reconciled with any literal application of "writings" as the determining standard.

The subsequent Acts of 1831,[1] 1856,[2] 1865,[3] 1870,[4] 1909,[5] 1912[6] and 1947[7] have done no more than extend the copyright protection to the developing products of intellectual effort which in the changing times have, in the judgment of Congress, warranted the exercise of its constitutional power.

The Act of 1909 which revised and reorganized the copyright laws and is the basic copyright law today expressly provided for copyright of all works of art.[8]

This Court has expressly held that protection of artistic works is within the power of Congress under Art. I, Sec. 8, Cl. 8. In *Burrow-Giles Lithographic Company* v. *Sarony*, 111 U. S. 53, this Court in upholding the power of Con-

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[1] Act of February 3, 1831, c. 16, 4 Stat. 436.

[2] Act of August 18, 1856, c. 169, 11 Stat. 138.

[3] Act of March 3, 1865, c. 123, 13 Stat. 540.

[4] Act of July 8, 1870, c. 230, 16 Stat. 198.

[5] Act of March 4, 1909, c. 230, 35 Stat. 1075.

[6] Act of August 24, 1912, c. 356, 37 Stat. 488.

[7] Act of July 30, 1947, c. 391, 61 Stat. 652. This act codified Title 17 of the United States Code into positive law.

[8] The House Report in connection with the Act of 1909 (H. R. Rep. No. 2222, 60th Cong. 2d Sess. 10, 1909) states with respect to the general provisions of Section 4 providing copyright for all the writings of an author, as follows:

"Section 4 is declaratory of existing law. It was suggested that the word 'works' should be substituted for the word 'writings', in view of the broad construction given by the courts to the word '[illegible]gs', but it was thought better to use the word 'writings', which is the word found in the Constitution. It is not intended by the use of this word to change in any way the construction which the courts have given to it."

gress to extend copyright to photographs broadly interpreted the constitutional power, and stated:

> "These statutes (the Acts of 1790 and 1802) certainly answer the objection that books only, or writing in the limited sense of a book and its author, are within the constitutional provision. Both these words are susceptible of a more enlarged definition than this" (p. 57).
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> * * * * *
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> "We entertain no doubt that the Constitution is broad enough to cover an act authorizing copyright of photographs, so far as they are representative of original intellectual conceptions of the author" (p. 58).
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> * * * * *
>
> "These findings, we think, show this photograph to be an original work of art, * * * and of a class of inventions for which the Constitution intended that Congress should secure to him the exclusive right to use, publish and sell, as it has done by section 4952 of the Revised Statutes" (p. 60).

In *Bleistein* v. *Donaldson Lithographing Co.*, 188 U. S. 239, this Court upheld a copyright on circus posters, where the constitutional question was expressly raised below. This Court stated (pp. 249, 250, 251):

> 'We shall do no more than mention the suggestion that painting and engraving unless for a mechanical end are not among the useful arts, the progress of which Congress is empowered by the Constitution to promote. The Constitution does not limit the useful to that which satisfies immediate bodily needs. * * * The copy is the personal reaction of an individual upon nature. Personality always contains something unique. * * * and a very modest grade of art has in it something irreducible, which

is one man's alone. That something he may copyright unless there is a restriction in the words of the act.

"If there is a restriction it is not to be found in the limited pretensions of these particular works. The least pretentious picture has more originality in it than directories and the like which may be copyrighted."

* * * * *

"Certainly works are not the less connected with the fine arts because their pictorial quality attracts the crowd and therefore gives them a real use—if use means to increase trade and to help to make money."

* * * * *

"It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."

Speaking for this Court in *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284, Mr. Justice Day after citing Bouvier's definition of copyright embracing "literary or artistic productions" states as follows with respect to Art. I, Sec. 8, Cl. 8 (p. 291):

"Under this grant of authority a series of statutes have been passed, having for their object the protection of the property which the author has in the right to publish his production, the purpose of the statute being to protect his right in such manner that the author may have the benefit of this property for a limited term of years. These statutes should be given a fair and reasonable construction with a view to effecting such purpose."

This Court in the case of photographs and pictorial illustrations and the lower courts in the case of maps, paint-

ings, sculpture and jewelry have upheld the constitutional basis of copyright where the work embodied creative or original artistic or intellectual effort.[1] There can be no sound constitutional objection to the extension by Congress of copyright protection to the three-dimensional subjects—first granted in the Act of 1870 to works of the fine arts and subsequently redefined in the Act of 1909 to include all works of art—where the work meets the test of artistic conception by the author.

(B) The Statutory Basis

Petitioners' arguments that the Copyright Act does not cover artistic jewelry and that the Copyright Office exceeded its authority in its Regulation 37 CFR, 1949, §202.8, have been expressly rejected by both Courts below, and are squarely contrary to the opinion of this Court in *Mazer* v. *Stein, supra.*

Section 202.8 of the Regulation specifically classified artistic jewelry as one of the works of art in Class G.[2]

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[1] Cf. *Derenberg et al.*, "The Meanings of 'Writings' in the Copyright Clause of the Constitution", 31 N. Y. U. L. R. 1263 (Nov. 1956), where it is stated, at page 1286:

"The fact that courts do not consider 'writings' a limitation on form does not mean that any form or subject is entitled to copyright protection. 'Writings' is defined as the expression or form by which the original ideas of the author are given expression. Writings according to the courts are the results, fruits, or conceptions of original or creative intellectual thought or labor, with the primary emphasis on originality and intellection."

[2] Section 202.8 of the Regulation used the following words:

"Works of art (Class G)—(a)—In General. This class includes works of artistic craftsmanship, in so far as their form but not their mechanical or utilitarian aspects are concerned, such as *artistic jewelry*, enamels, glassware, and tapestries, as well as all works belonging to the fine arts, such as paintings, drawings and sculpture * * *." (Emphasis supplied)

This Court in *Mazer* v. *Stein* expressly approved said Regulation and held that the standard of copyrightability therein stated conforms in every respect with the intention of Congress as expressed in the Copyright Act. After quoting §202.8 of the Regulation, this Court stated (347 U. S. at 214):

> "* * * Individual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art. As a standard we can hardly do better than the words of the present Regulation, §202.8, *supra*, naming the things that appertain to the arts. They must be original, that is, the author's tangible expression of his ideas. Compare *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U. S. 53, 59-60. Such expression, whether meticulously delineating the model or mental image or conveying the meaning by modernistic form or color, is copyrightable."

A literal reading of Section 5(g) of the Act of 1909 and the legislative history, as well as the interpretation thereof reflected in the regulations and practice of the Copyright Office since 1909, readily shows "the lack of substance" to the petitioners' contention, as the Court of Appeals below so characterized it. The fact that the Act does not specifically list artistic jewelry or artistic craftsmanship or any particular work is of no consequence; it includes all "works of art."

Petitioners' argument *ad hominem* that the Register of Copyrights has assumed a legislative function fails to grasp that Section 202.8 of the Regulations merely implements the declared policy of Congress. A reading of Regulation §202.8 shows that it was simply intended to reflect in the classification both ordinary works of art, which Congress introduced in the Act of 1909, and works belong-

ing to the fine arts, which Congress had previously introduced in the Act of 1870.[1]

Petitioners contend that the Act does not protect works of artistic craftsmanship. Since Michelangelo's famous statue of David and Cellini's great saltcellar are undeniably "works of artistic craftsmanship," the petitioners' argument would make the 1909 Act even more limited than the 1870 Act. Petitioners would have this Court believe it did not mean what it said when in *Mazer* v. *Stein* it approved Regulation §202.8 naming artistic craftsmanship as one of the works of art, and that Congress did not mean what it said when it eliminated the word "fine" in the 1909 Act.

By adopting the broad phrase "works of art" in 1909, Congress not only eliminated any distinction which might have theretofore existed between the great works and the works of artistic craftsmanship not achieving the level of greatness; it also, by refusing to specify rigid categories of "art", further expressed a clear intention to protect by copyright original works in a broad variety of artistic, three-dimensional forms.

The copyrighted jewelry pieces designed by Marcel Boucher evidence originality and the use of recognized art

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[1] There is no conceivable relationship between the issues in this case and the provisions of the recently adopted Universal Copyright Convention, 17 U. S. C. §9 (68 Stat. 1030). The anxiety expressed by petitioners (Pet. p. 21) that the Copyright Office might suddenly eliminate certain works from copyright protection in the future is somewhat less than real. In the portion of the trial record quoted by petitioners themselves, Mr. Abraham L. Kaminstein, Chief of the Examining Division of the Copyright Office, testified that "obviously" the Register of Copyrights would not amend the regulations "so as to exclude the registration of copyrightable material" (D. 218a).

techniques characteristically employed in the creation of works belonging to the traditional fine arts. Jewelry design has, historically, attracted the talents of some of the world's greatest artists and sculptors.[1] It tortures plain language of the statute to suggest that Congress has denied copyright to works of the jewelry art which through the centuries has been one of the great recognized arts. As pointed out above, the only difference between costume jewelry and precious jewelry is that the former uses base metals and artificial stones. Indeed, with the popularity that has developed for costume jewelry today the art shown in that form has frequently achieved greater artistic creativeness and imagination than in the designs of precious jewelry.

The lower courts have consistently held that artistic costume jewelry is entitled to copyright under the statute. In *Trifari, Krussman & Fishel, Inc.* v. *Charel Co., Inc.*, S. D. N. Y. 1955, 134 F. Supp. 551, the District Court stated (p. 553):

> "* * * Costume jewelry may express the artistic conception of its 'author' no less than a painting or a statue. * * * There is neither basis in the Copyright Act nor judicial precedent for excluding cos-

[1] In Rogers and Beard, "5000 Years of Gems and Jewelry", Frederick A. Stokes Company (1940), the authors trace the evolution of the jeweler's art, and point out that in the Renaissance goldsmiths, being unable to apply creative imagination to jewelry, were obliged to employ leading artists for that purpose. At page 96 it is stated: "The practice of using patterns designed by draughtsmen, instead of by the goldsmiths themselves, was followed also in France and Germany; and designs for jewelry were made by the leading artists of the day, Albert Durer, the great German artist, among others. * * *" In *Jungersen* v. *Baden*, S. D. N. Y. 1947, 69 F. Supp. 922, 928, the court commented as follows:

"Cellini was undoubtedly a sculptor, but I doubt the jewelers would have regarded him an intruder in their midst. * * * Cellini's first apprenticeship was to a goldsmith. At home he was employed on jewelry. Is his celebrated salt-cellar in the sculptor's or the jeweler's art?"

tume jewelry from works of art to which copyright protection may attach."

To the same effect, see:

Hollywood Jewelry Mfg. Co., Inc. v. *Dushkin*, S. D. N. Y. 1955, 136 F. Supp. 738;

Trifari, Krussman & Fishel, Inc. v. *B. Steinberg-Kaslo Co.*, S. D. N. Y. 1956, 144 F. Supp. 577.

Significantly, petitioners have cited no judicial, legislative or administrative authority denying the right to copyright artistic jewelry. Supporting the copyrightability of artistic jewelry, on the other hand, are a clear and unambiguous mandate from Congress, established Copyright Office practice, a lawfully adopted Regulation of the Copyright Office, a Supreme Court decision upholding that Regulation, and decisions by at least four District Judges upholding the validity of copyrights on jewelry.

Certainly, in this day when serious critics of the American scene have noted a disturbing trend towards mass culture and conformity, every encouragement should be given to creative intellectual effort in all fields of artistic and literary endeavor under the broad constitutional power to promote the progress of "Science and useful Arts."

CONCLUSION

For want of a properly presented substantial federal question, and because the record in no respect presents any question meriting review by this Court, it is respectfully submitted that the petition should be denied.

Respectfully submitted,

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